



1 period of disability and disability insurance benefits, alleging  
2 disability beginning September 6, 2007. Tr. 13; 147. Plaintiff  
3 reported that depression and a stress disorder limit his ability to  
4 work, and he asserted that his medical conditions of herpes and  
5 shingles are caused by his stress disorder. Tr. 146. Plaintiff's  
6 claim was denied initially and on reconsideration, and he requested  
7 a hearing before an administrative law judge (ALJ). Tr. 62-85. A  
8 hearing was held on August 6, 2010, at which vocational expert  
9 Sharon Nemet Welter, and Plaintiff, who was represented by counsel,  
10 testified. Tr. 33-61. ALJ James W. Sherry presided. Tr. 33. The  
11 ALJ denied benefits on August 20, 2010. Tr. 13-24. The instant  
12 matter is before this court pursuant to 42 U.S.C. § 405(g).

#### 13 **STATEMENT OF THE CASE**

14 The facts of the case are set forth in detail in the transcript  
15 of proceedings and are briefly summarized here. At the time of the  
16 hearing, Plaintiff was 60 years old. Tr. 37. He was divorced,  
17 shared a house with his grown son, but stayed with his girlfriend  
18 often. Tr. 37-38. He completed high school, and five years of  
19 college. Tr. 38.

20 In 2006, Plaintiff began experiencing significant pain in his  
21 jaw, which was eventually diagnosed as shingles. Tr. 41. The  
22 shingles rash began near the corner of his mouth, and spread nearly  
23 to his ear. Tr. 41. His employer told him to take short-term  
24 disability leave, so he did. Tr. 41. After the shingles rash  
25 resolved, the pain remained. Tr. 41. Plaintiff testified that he  
26 returned to work in 2007, but eventually the pain was so severe, he  
27 quit. Tr. 42.

28 Plaintiff testified that he still experiences pain on a daily

1 basis, and he has learned to manage the pain by pacing himself and  
2 taking frequent breaks. Tr. 43. He said he can push himself and  
3 perform household chores in a stretch of up to four hours, but if he  
4 does, he will be incapacitated for the next two or three days. Tr.  
5 44. He testified that when the pain is really severe, he cannot do  
6 anything. Tr. 46. He has to rest in a quiet state, similar to  
7 meditation, for about 45 minutes. Tr. 47. Plaintiff also testified  
8 that he stopped taking anti-depressants because he was "in a  
9 constant fog." Tr. 51.

10 Plaintiff has past work experience as a sales clerk, retail  
11 department manager, manager of a retail store, and driver. Tr. 55.

#### 12 ADMINISTRATIVE DECISION

13 Preliminarily, ALJ Sherry found that Plaintiff met the insured  
14 status requirement of the Social Security Act through December 31,  
15 2012. Tr. 15. At step one, the ALJ found that Plaintiff had not  
16 engaged in substantial gainful activity since September 6, 2007.  
17 Tr. 15. At step two, he found Plaintiff had the severe impairments  
18 of depressive disorder; pain disorder associated with psychological  
19 factors and a general medical condition; alcohol dependence; herpes  
20 simplex; and shingles. Tr. 15. At step three, the ALJ determined  
21 Plaintiff's impairments, alone and in combination, did not meet or  
22 medically equal one of the listed impairments in 20 C.F.R., Subpart  
23 P, Appendix 1 (20 C.F.R. §§ 416.920(d), 416.925 and 416.926). Tr.  
24 16. The ALJ found Plaintiff has the residual functional capacity  
25 ("RFC") to perform a full range of work at all exertional levels but  
26 with the following nonexertional limitations:

27 [T]he claimant's ability to climb ladders, rope and  
28 scaffolds is limited to occasional; whereas, climbing  
ramps, climbing stairs, balancing, stooping, crouching,

1 kneeling and crawling are frequent. The claimant should  
2 also avoid unprotected heights and the use of moving  
3 machinery. Moreover, the claimant can understand and  
4 perform simple, routine and repetitive tasks, some well-  
5 learned detailed tasks with no fast-paced production  
6 requirements. Yet, he is limited to occasional decision-  
7 making and changes in the work setting. Last, the  
8 claimant should only have occasional interaction with the  
9 public and co-workers.

10 Tr. 18.

11 In step four findings, the ALJ found Plaintiff's statements  
12 regarding pain and limitations were not credible to the extent they  
13 were inconsistent with the RFC findings. Tr. 19. At step four, the  
14 ALJ found that Plaintiff is capable of performing past relevant work  
15 as a van driver. Tr. 22.

#### 16 STANDARD OF REVIEW

17 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
18 court set out the standard of review:

19 A district court's order upholding the Commissioner's  
20 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,  
21 211 F.3d 1172, 1174 (9<sup>th</sup> Cir. 2000). The decision of the  
22 Commissioner may be reversed only if it is not supported  
23 by substantial evidence or if it is based on legal error.  
24 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999).  
25 Substantial evidence is defined as being more than a mere  
26 scintilla, but less than a preponderance. *Id.* at 1098.  
27 Put another way, substantial evidence is such relevant  
28 evidence as a reasonable mind might accept as adequate to  
support a conclusion. *Richardson v. Perales*, 402 U.S.  
389, 401 (1971). If the evidence is susceptible to more  
than one rational interpretation, the court may not  
substitute its judgment for that of the Commissioner.  
*Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*  
*Social Sec. Admin.*, 169 F.3d 595, 599 (9<sup>th</sup> Cir. 1999).

The ALJ is responsible for determining credibility,  
resolving conflicts in medical testimony, and resolving  
ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup>  
Cir. 1995). The ALJ's determinations of law are reviewed  
*de novo*, although deference is owed to a reasonable  
construction of the applicable statutes. *McNatt v. Apfel*,  
201 F.3d 1084, 1087 (9<sup>th</sup> Cir. 2000).

It is the role of the trier of fact, not this court, to resolve

1 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
2 supports more than one rational interpretation, the court may not  
3 substitute its judgment for that of the Commissioner. *Tackett*, 180  
4 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
5 Nevertheless, a decision supported by substantial evidence will  
6 still be set aside if the proper legal standards were not applied in  
7 weighing the evidence and making the decision. *Browner v. Secretary*  
8 *of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If  
9 substantial evidence exists to support the administrative findings,  
10 or if conflicting evidence exists that will support a finding of  
11 either disability or non-disability, the Commissioner's  
12 determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
13 1230 (9<sup>th</sup> Cir. 1987).

#### 14 SEQUENTIAL PROCESS

15 The Commissioner has established a five-step sequential  
16 evaluation process for determining whether a person is disabled. 20  
17 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.  
18 137, 140-42 (1987). In steps one through four, the burden of proof  
19 rests upon the claimant to establish a prima facie case of  
20 entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99.  
21 This burden is met once a claimant establishes that a physical or  
22 mental impairment prevents him from engaging in his previous  
23 occupation. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a  
24 claimant cannot do his past relevant work, the ALJ proceeds to step  
25 five, and the burden shifts to the Commissioner to show that (1) the  
26 claimant can make an adjustment to other work; and (2) specific jobs  
27 exist in the national economy which claimant can perform. *Batson v.*  
28 *Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-94 (2004).

1 If a claimant cannot make an adjustment to other work in the  
2 national economy, a finding of "disabled" is made. 20 C.F.R. §§  
3 404.1520(a)(4)(I-v), 416.920(a)(4)(I-v).

#### 4 ISSUES

5 The question presented is whether substantial evidence exists  
6 to support the ALJ's decision denying benefits and, if so, whether  
7 that decision is based on proper legal standards. Plaintiff  
8 contends that the ALJ erred by failing to properly weigh the opinion  
9 from Dennis R. Pollack, Ph.D. ECF No. 14 at 7-12. Defendant  
10 responds that the ALJ properly weighed Dr. Pollack's opinions and  
11 raises the issue that the ALJ's step five determination that  
12 Plaintiff could perform unskilled light work was error, but contends  
13 it was harmless error. ECF No. 16 at 5-18.

#### 14 DISCUSSION

15 Plaintiff contends that the ALJ erred by failing to properly  
16 weigh the opinions from Dennis R. Pollack, Ph.D. ECF No. 14 at 7-  
17 12. Specifically, Plaintiff argues the ALJ dismissed his opinions  
18 based on boilerplate language that was not specific, and improperly  
19 considered the purpose for which the exam was obtained. ECF No. 17  
20 at 2-3. The ALJ "accorded weight to Dr. Pollack's opinion only to  
21 the extent it was consistent with this determination and residual  
22 functional capacity." Tr. 21.

23 As a general rule, an ALJ should give more weight to the  
24 opinion of a treating source than to the opinion of doctors who do  
25 not treat the claimant. *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir.  
26 1995). Where the treating doctor's opinion is not contradicted by  
27 another doctor, it may be rejected only for "clear and convincing"  
28 reasons. *Id.* Where the treating doctor's opinion is contradicted

1 by another doctor, the ALJ may not reject this opinion without  
2 providing "specific and legitimate reasons" supported by substantial  
3 evidence in the record for so doing. *Murray v. Heckler*, 722 F.2d  
4 499, 502 (9th Cir. 1983).

5 The opinion of an examining physician is, in turn, entitled to  
6 greater weight than the opinion of a nonexamining physician. *Pitzer*  
7 *v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990). The Commissioner  
8 must provide "clear and convincing" reasons for rejecting the  
9 uncontradicted opinion of an examining physician. *Pitzer*, 908 F.2d  
10 at 506. Where contradicted by another doctor, the ALJ may rejected  
11 an examining physician's opinions for specific and legitimate  
12 reasons that are supported by substantial evidence in the record.  
13 *Andrews*, 53 F.3d at 1043.

14 In this case, Dr. Pollack examined Plaintiff on July 14, 2010.  
15 Tr. 280. Dr. Pollack administered several objective medical tests.  
16 Tr. 280. Dr. Pollack explained that the test results indicated  
17 Plaintiff was forthright and honest, and his tests revealed he was  
18 "in a great deal of physiology distress and is having difficulty  
19 adjusting psychologically." Tr. 283. Dr. Pollack explained,  
20 "[s]uch people lack stamina, feel weak, fatigued, tense and nervous  
21 much of the time." Based upon the test results and his examination,  
22 Dr. Pollack diagnosed Plaintiff with Pain Disorder associated with  
23 both psychological and general medical condition, and depressive  
24 disorder, NOS. Tr. 285.

25 Dr. Pollack completed a Mental Medical Source Statement, in  
26 which he assessed Plaintiff with marked limitations in both the  
27 ability to perform activities within a schedule, maintain regular  
28 attendance and be punctual within customary tolerances, and in the

1 ability to complete a normal workday and workweek without  
2 interruptions from psychologically based symptoms and to perform at  
3 a consistent pace without an unreasonable number and length of rest  
4 periods. Tr. 287.

5 In discussing the opinion from Dr. Pollack, the ALJ explicitly  
6 "emphasized" that Plaintiff procured the examination to assist in  
7 his social security disability case: "The claimant underwent the  
8 evaluation through attorney referral and in connection with an  
9 effort to generate evidence for the current appeal. Further, the  
10 evaluator was presumably paid for the report. Although such  
11 evidence is certainly legitimate[,] it deserves due consideration  
12 and it cannot be entirely ignored." Tr. 20. To the extent the ALJ  
13 discounted Dr. Pollack's opinion because it was obtained by and paid  
14 for by the claimant, the ALJ erred. It is well established that  
15 "[t]he purpose for which medical reports are obtained does not  
16 provide a legitimate basis for rejecting them." *Lester*, 81 F.3d at  
17 832. "An examining doctor's findings are entitled to no less weight  
18 when the examination is procured by the claimant than when it is  
19 obtained by the Commissioner." *Id*; *Ratto v. Secretary*, 839 F. Supp.  
20 1415, 1426 (D.Or. 1993). The ALJ erred in relying upon this reason  
21 in rejecting Dr. Pollack's opinions.

22 The other reasons the ALJ provided for rejecting Dr. Pollack's  
23 opinions were "there was no objective basis for the marked  
24 limitations, when the testing indicated otherwise, and it appears it  
25 to be only [sic] derived from the claimant's self-reports in an  
26 attorney referral evaluation." Tr. 21. First, as Plaintiff points  
27 out, it is insufficient for the ALJ TO reject a medical opinion  
28 based upon a broad, conclusory statement that the findings are not



1 supported by sufficient objective findings. *Embrey v. Bowen*, 849  
2 F.2d 418, 421-22 (9<sup>th</sup> Cir. 1988). "The ALJ must do more than offer  
3 his conclusions. He must set forth his own interpretations and  
4 explain why they, rather than the doctors, are correct." *Id.* Where  
5 an ALJ and a physician's conclusions are different, "it is incumbent  
6 on the ALJ to provide detailed, reasoned, and legitimate rationales  
7 for disregarding the physicians' findings." *Id.* In this case, the  
8 ALJ failed to provide detailed reasons for discounting Dr. Pollack's  
9 opinion. In the absence of detailed reasoning, the ALJ's rejection  
10 of Dr. Pollack's opinion was error. Dr. Pollack's ultimate  
11 conclusions about Plaintiff's marked impairments "cannot be  
12 disregarded unless clear and convincing reasons for doing so exist  
13 and are set forth in proper detail." *Id.*; see *Delgado v. Heckler*,  
14 722 F.2d 570, 574 (9<sup>th</sup> Cir. 1983).

15 Second, while it is permissible to reject a physician's opinion  
16 that is based upon a discredited Plaintiff's subjective report of  
17 symptoms,<sup>2</sup> in this case, the ALJ inextricably linked this valid  
18 reason with an invalid reason - the fact that Plaintiff procured the  
19 examination to assist with his claim.

20 Moreover, while the ALJ asserted that the mental RFC "gave the  
21 benefit of the doubt with respect to a pain disorder, depression and  
22 difficulty with his stress tolerance," the record does not support  
23

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24 <sup>2</sup>Where a medical source's opinion is based largely on the  
25 Plaintiff's own subjective description of symptoms, and the ALJ has  
26 discredited the Plaintiff's claim as to those subjective symptoms,  
27 the ALJ may reject that opinion. *Fair v. Bowen*, 885 F.2d 597, 605  
28 (9<sup>th</sup> Cir. 1989).

1 this statement. Tr. 21. The RFC does not include Dr. Pollack's  
2 assessments of Plaintiff's marked impairments. The vocational  
3 expert testified that if Plaintiff has the marked impairments as  
4 assessed by Dr. Pollack, Plaintiff would be unable to maintain  
5 competitive employment. Tr. 58.

6 Thus, even if the improperly rejected medical evidence is  
7 credited, on the record before the court it is not conclusive that  
8 a reasonable ALJ, considering the existing and contradictory medical  
9 evidence of physical and psychological impairments, would find  
10 Plaintiff disabled. Therefore, remand for additional proceedings is  
11 appropriate. See *Stout v. Commissioner, Social Sec. Admin.*, 454  
12 F.3d 1050, 1056 (9th Cir. 2006); see also *Salvador v. Sullivan*, 917  
13 F.2d 13, 15 (9th Cir. 1990).

#### 14 CONCLUSION

15 Having reviewed the record and the ALJ's findings, the court  
16 concludes the ALJ's decision is not supported by substantial  
17 evidence and is based on legal error. On remand, the ALJ shall  
18 reevaluate the opinions of the medical source opinions, explain the  
19 weight given to medical sources, and, if necessary, provide legally  
20 sufficient reasons for rejecting medical source opinions.  
21 Additionally, Defendant raised an issue that the ALJ's step five  
22 determination that Plaintiff could perform unskilled light work was  
23 error, but contends it was harmless. ECF No. 16 at 5-18. Plaintiff  
24 does not address this issue. On remand, the ALJ will reevaluate his  
25 determination at step four and if necessary, make new step five  
26 findings. The decision is therefore **REVERSED** and the case is  
27 **REMANDED** for further proceedings consistent with this opinion.  
28 Accordingly,

**IT IS ORDERED:**

1. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is **GRANTED** and the matter is **REMANDED** to the Commissioner for additional proceedings.

2. Defendant's Motion for Summary Judgment (ECF No. 16) is **DENIED**.

3. An application for attorney fees may be filed by separate motion.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff, and the file shall be **CLOSED**.

DATED May 30, 2013.

S/ CYNTHIA IMBROGNO  
UNITED STATES MAGISTRATE JUDGE